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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re A.X., et al., Persons Coming Under the
Juvenile Court Law.

MADERA COUNTY DEPARTMENT OF
SOCIAL SERVICES,

Plaintiff and Respondent,

v.

LUIS M.,

Defendant and Appellant.

F069889

(Super. Ct. No. MJP017194 &
MJP017195)

OPINION

APPEAL from orders of the Superior Court of Madera County. Thomas L.
Bender, Judge.

Thomas W. Casa, under appointment by the Court of Appeal, for Defendant and
Appellant.

Douglas Nelson, County Counsel, Miranda P. Neal and Christine Nijjer, Deputy
County Counsel, for Plaintiff and Respondent.

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Luis M. (father) challenges the termination of his court-ordered family reunification services under Welfare and Institutions Code section 388, subdivision (c).¹ He contends the juvenile court erred in granting the petitions to terminate his services, as there was no new evidence or changed circumstances, and no evidence that services were detrimental to his children. He also challenges the juvenile court's finding that he received reasonable services. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

These dependency proceedings were initiated in July 2013 after father was arrested for sexually abusing S.G., the 12-year-old daughter of father's live-in girlfriend, Veronica G. (mother). The Madera police took S., her 13-year-old brother L.G., and the son and daughter father and mother had together, 10-year-old A.X. and six-year-old M.X., into protective custody; the Madera County Department of Social Services (Department) placed the children in foster care.²

The Department filed a dependency petition alleging the children came within the provisions of section 300, subdivisions (b) (failure to protect), (c) (serious emotional damage), and (d) (sexual abuse) based on father's sexual abuse of S. and mother's failure to protect S. from such abuse, which placed the other children at substantial risk of suffering serious physical and emotional harm, as well as sexual abuse, and ongoing domestic violence between father and mother. The petition further alleged that L., A. and M. came within the provisions of section 300, subdivision (j), based on the abuse of their sibling and half-sibling, S.

Following a contested jurisdictional hearing on September 11, 2013, the juvenile court found the petition's allegations true. In the report prepared for the dispositional

¹ Undesignated statutory references are to the Welfare and Institutions Code.

² Mother's 17-year-old daughter, D.G., was also a subject of the petition, but she was not detained, as she had been living with relatives. D. was dismissed from the case at the jurisdictional hearing, as she had turned 18.

hearing, the social worker stated that father was incarcerated at the Madera County Department of Corrections with the following charges pending: (1) driving under the influence of alcohol/drugs (Veh. Code, § 23152, subd. (a)); (2) driving under the influence with a blood alcohol content over .08 (Veh. Code, § 23152, subd. (b)); (3) driving without a license (Veh. Code, § 12500, subd. (a)); (4) driving without evidence of financial responsibility (Veh. Code, § 16028, subd. (a)); (5) rearrest/revocation of probation (Pen. Code, § 1203.2, subd. (a)); and (6) three counts of lewd or lascivious acts with a child under 14 with force (Pen. Code, § 288, subd. (b)(1))). In addition to these charges, an immigration hold was placed on father. Due to father's incarceration in the county jail, the Department was unable to contact the Department of Justice regarding his criminal history. In an interview with the social worker, father minimized the reason for his incarceration and the possible charges he was facing; father denied knowing why he was arrested and said he did nothing wrong.

On September 24, 2013, father told the social worker he wanted to visit his children, A. and M.³ Since mother had told A. and M. that father was in Mexico, the social worker gave mother the opportunity to tell them the truth about father's whereabouts, which she did on September 26. A. and M. told the social worker they wanted to visit father at the jail. The social worker contacted the jail to schedule a day and time for jail visits, and was awaiting a response. Once scheduled, father would participate in supervised visits.

The Department recommended reunification services be granted to mother and father. With respect to reunification services for father, the report stated that due to his incarceration, no services could be provided to him to address his substance abuse issues,

³ At the July 31, 2013 detention hearing, the juvenile court ordered reasonable supervised visits for the parents. The social worker later reported that during a supervised visit with mother on August 8, 2013, the children told mother they wanted to see father, but mother told them father was sad that he could not visit them right now.

but the social worker would mail him reading material on parenting and domestic violence until his release from jail. The Department proposed as father's case plan that, upon his release from jail, he would participate in a mental health assessment and recommended treatment, attend Alcoholics Anonymous meetings, complete a substance abuse assessment and recommended treatment, and submit to random drug testing. The proposed case plan also required father to enroll and participate in an approved parenting program. The social worker would arrange at least once weekly visitation between father and his children.

At the October 8, 2013 dispositional hearing, the juvenile court declared the children dependents, ordered reunification services for both mother and father, and adopted the Department's proposed case plan. Father's criminal case was still pending. At the conclusion of the hearing, the juvenile court allowed father's children to visit with him because it thought they had not seen him for a while. The six-month review hearing was set for March 25, 2014.

The day before the scheduled six-month review hearing, the Department filed identical section 388 petitions⁴ in the cases of A. and M. to terminate reunification services for both parents. As new information, the Department asserted (1) that mother's boyfriend, Javier V., had sexually abused S. from December 2013 to February 2014, and mother failed to protect S. from that abuse, and (2) father was incarcerated throughout the pendency of the case, he remained incarcerated, and he was subject to deportation upon the conclusion of his criminal case. The Department stated termination of services would be in the best interest of A. and M. because they would be protected from further neglect by mother, and continuing father's reunification services would be detrimental to them

⁴ For ease of reference, we will refer to these section 388 petitions in the singular.

under section 361.5, subdivision (e). The juvenile court set a hearing on the petitions for April 15, 2014,⁵ and continued the six-month review hearing to the same date.

In the status review report prepared for the six-month review hearing, filed on April 14, the Department recommended termination of reunification services for both parents and that a section 366.26 hearing be set. Father was still incarcerated at the county jail and therefore was unable to participate in services. Father was upset that his continued incarceration for crimes he claimed he did not commit was impeding his ability to participate in services and reunify with his children. Father believed it was unjust to terminate his services, as he hoped to be released soon, and have his children returned to him.

Father's preliminary hearing was scheduled for April 18. On March 26, a Madera County district attorney told the social worker that an offer had been made to father that if he were to plead guilty to the sexual abuse charges, he would receive a maximum sentence of eight years in custody. It was unknown at the time of the writing of the report when father would be released. The Department mailed parenting material to father; father confirmed he received it and mailed it back, but the Department never received it.

Father was visiting his children weekly at the jail. According to the social worker, the visits had gone well overall; father talked with the children about school, sports, video games and other things. Father, however, had some inappropriate conversations with the children, including asking them if mother had a boyfriend and to relay messages to mother on his behalf. On March 20, the social worker told father to stop and warned him that if he continued to ask inappropriate questions, his visitation could be jeopardized.

The Department asserted that continuing reunification services for father would be detrimental under section 361.5, subdivision (e), because: his children, who were 11 and

⁵ Subsequent references to dates are to dates in 2014 unless otherwise noted.

seven years old, needed stability and permanency in their lives; while there appeared to be a parent-child bond, the nature of that bond was questionable; while it was unknown when father would be released, he was offered a maximum sentence of eight years as part of a plea deal; the charges filed against father were of a sexual nature, which is of great concern to the safety, protection and wellbeing of his children; and, since there was an immigration hold on father, it was very likely he would be deported to Mexico after his release from custody, making it unlikely he would be released within the reunification time limits. The social worker also noted the children had a close relationship with father, and the children wanted to reunify with father and return to his care.

The juvenile court set a contested hearing on both the section 388 petition and six-month review hearing for May 19. The hearing took place over three days, May 19, June 13 and June 23. At the May 19 hearing, the Department submitted on its April 14 report. Mother testified on her own behalf regarding the man who was living in her home and how she discovered he was involved in an inappropriate relationship with S.

At the June 13 continued hearing, father's attorney wanted to call the social worker. The juvenile court asked what father's position was; father's attorney responded that father was against termination of services, as he had done nothing wrong, and asserted termination was based on mother's alleged failure to protect her daughter. The juvenile court asked when father would be released from custody. Neither father nor his attorney knew; father stated that he had a court date, but it was put over because he had to come to this hearing.

The social worker, Esperanza Ramos, then testified that she recommended father receive reunification services at the disposition hearing because at that time, she was not sure if father was going to remain in custody for an extended period of time, his children had a relationship with him, and he wanted services. Ramos had hoped father would be released so he could participate in services. Ramos mailed father a parenting packet in January; father confirmed he received it and told Ramos at the end of January that he had

mailed it back. The Department, however, never received it. Ramos re-mailed another packet to father in June, which arrived that week. Ramos did not re-mail it sooner because she hoped she would receive father's completed packet.

Ramos had witnessed the bond between father and his children. Father was receiving visits every week on Thursdays and had visited consistently. The visits were going well, "for the most part." Father engaged in meaningful visitation with his children, including helping them with their homework. The children are excited to see father and the visits were productive.

Ramos changed her recommendation regarding services because father remained incarcerated where he could not access services, and his children needed a parent available to them. Ramos explained that "the biggest factor is that he's still in custody and we don't know when he'll be released." Ramos believed the section 388 petition mentioned mother's failure to protect S. as the reason for the requested change; when asked whether there was no other reason stated in the petition as to why the Department was asking to terminate services, Ramos responded, "I think. Correct." Ramos believed it was in A. and M.'s best interest to terminate father's services despite their relationship with him, because the children needed stability, father remained incarcerated, and there was nothing to show he had benefitted from any services.

On cross-examination, county counsel asked Ramos if there was any other factor for bypassing father's services. Ramos responded there were the criminal sexual abuse allegations, which placed father's children at risk of sexual abuse and outweighed their bond with father. Ramos, however, admitted on re-direct examination that this was not new information, as she had this information at the disposition hearing, but she thought the sexual allegations had not been analyzed correctly at the time. Essentially, Ramos was saying she made a mistake.

Ramos had called on June 12 to ask about the procedural status of father's criminal case, but had not received a return call. The last information she had was that a

pre-preliminary hearing was to occur at the end of May. To her knowledge, the case had not been resolved; the case was delayed in part because father had a new attorney. Ramos did not think father's children would suffer detriment if services were terminated. Although Ramos guessed father could be released from custody in two weeks and admitted he had not been tried or sentenced, she had a conversation with the district attorney who mentioned an offer that would entail an eight year sentence.

After receiving all of the evidence, the juvenile court continued the hearing to June 23 so it could look at the evidence and make a decision. At the outset of the June 23 hearing, the juvenile court announced its tentative decision to deny the section 388 petition as to both mother and father, and with respect to the six-month review, to continue reunification services for mother but terminate them for father. With respect to the ruling on father, county counsel agreed it was likely father would not be released soon, and while he technically was entitled to 12 months of services, it was more appropriate to terminate services under section 361.5, subdivision (e) due to his incarceration.

Father's attorney submitted on the tentative with respect to the section 388 petition, but asserted the juvenile court could not terminate services because father was entitled to 12 months of services, he had not been convicted yet, and he had not been provided reasonable services. The attorney asked for continuation of services so father and the social worker could attempt to find more services that were starting to become available at the jail, although the attorney could not identify any services that were available to father that he actually needed. The juvenile court confirmed the 12-month review deadline was in September 2014 and asked if there was an immigration hold on father; father's attorney responded there was and, according to father, the investigation into his criminal case still was pending and the court case had been continued. After all parties submitted, the juvenile court modified its tentative decision and denied the section

388 petition as to mother, but granted it as to father. It also ruled that with respect to the six-month review, it was terminating father's services and continuing mother's.

The six-month review hearing was continued to July 1 for the preparation of the case plan, and findings and orders. At the July 1 hearing, at father's attorney's request, the juvenile court ordered that father's once-weekly visits continue as previously set even though his services had been terminated. On July 10, the juvenile court adopted the Department's proposed case plan, as well as the recommended findings and orders, and set a 12-month review hearing for September 18. The findings and orders included a finding that father had been provided or offered reasonable services, the Department complied with the case plan by making reasonable efforts for the children's safe return home, father's services were terminated, and father's visits were to continue.

DISCUSSION

Family reunification services play a critical role in dependency proceedings. (*In re Alanna A.* (2005) 135 Cal.App.4th 555, 563.) When a child is removed from the physical custody of his or her parent, the juvenile court is required to offer or provide family reunification services to the child's mother and presumed father. (§ 361.5, subd. (a).) Unless a reunification bypass provision applies under section 361.5, subdivisions (b) or (e), a parent of a child three years of age or older generally will have 12 months to mitigate the conditions that led to the initial removal and continued custody of the child. (§ 361.5, subd. (a)(1)(A).)

Under section 388, subdivision (c),⁶ a party may seek early termination of services by bringing a petition before the time specified for the 12-month review hearing

⁶ Section 388, subdivision (c) states, in relevant part:

“(1) Any party, . . . may petition the court, prior to the hearing set pursuant to subdivision (f) of Section 366.21 for a child described by subparagraph (A) of paragraph (1) of subdivision (a) of Section 361.5, or prior to the hearing set pursuant to subdivision (e) of Section 366.21 for a child described by subparagraph (B) or (C) of paragraph (1) of subdivision (a) of Section 361.5, to terminate court-ordered reunification services

and must show a change of circumstances or new evidence either that one of the bypass provisions of section 361.5, subdivisions (b) or (e) now applies, or that parental action or inaction has created a substantial likelihood that reunification will not occur. (§ 388, subd. (c)(1).) In the first situation, the party also must prove the relevant elements of the bypass provision, while in the second situation, the evidence will relate to the parent's lack of performance of the reunification plan or other behavior which impedes reunification. (*Ibid.*) The juvenile court can grant early termination only if it finds, by a preponderance of the evidence, that reasonable services were offered or provided and, by clear and convincing evidence, that the conditions relied upon in the petition have been shown. (§ 388, subd. (c)(3).) The latter standard of proof parallels the standard of proof for termination of services under both the bypass provisions in section 361.5, subdivisions (b) and (e), and the review hearings pursuant to section 366.21, subdivisions (e) and (f).

Here, the Department elected to bring the section 388, subdivision (c) petition as to father under subdivision (c)(1)(A), relying on the bypass provisions of section 361.5,

provided under subdivision (a) of Section 361 .5 only if one of the following conditions exists:

“(A) It appears that a change of circumstance or new evidence exists that satisfies a condition set forth in subdivision (b) or (e) of Section 361.5 justifying termination of court-ordered reunification services.

“(B) The action or inaction of the parent or guardian creates a substantial likelihood that reunification will not occur, including, but not limited to, the parent or guardian's failure to visit the child, or the failure of the parent or guardian to participate regularly and make substantive progress in a court-ordered treatment plan.

“(2) In determining whether the parent or guardian has failed to visit the child or participate regularly or make progress in the treatment plan, the court shall consider factors that include, but are not limited to, the parent's or guardian's incarceration . . .

“(3) The court shall terminate reunification services during the above-described time periods only upon a finding by a preponderance of evidence that reasonable services have been offered or provided, and upon a finding of clear and convincing evidence that one of the conditions in subparagraph (A) or (B) of paragraph (1) exists.”

subdivision (e).⁷ Thus, the Department had to establish changed circumstances or new evidence which satisfied section 361.5, subdivision (e) and justified termination of services. Here, the petition relied upon father's continued incarceration and his being subject to deportation upon conclusion of his criminal case. The Department also had to show that reasonable services were provided.

Father contends the juvenile court erred when it terminated his reunification services under section 388, subdivision (c)(1)(A). He argues that the charges pending against him and his continued incarceration do not constitute new evidence or changed circumstances that would support granting the petition and there was no evidence to support a finding that his children would suffer detriment from continuing his services. Father further contends the reasonable services finding is not supported by substantial evidence.

Reasonable Services

Father asserts the social worker did not make a good faith effort to provide the two services that were available to him in jail, visitation and the parenting packet, therefore the evidence is insufficient to support the reasonable services finding. Specifically, father argues that because there were delays in receiving both services, as visits with his

⁷ Section 361.5, subdivision (e)(1) provides, in relevant part: "If the parent ... is incarcerated, ... the court shall order reasonable services unless the court determines, by clear and convincing evidence, those services would be detrimental to the child. In determining detriment, the court shall consider the age of the child, the degree of parent-child bonding, the length of the sentence, the length and nature of the treatment, the nature of the crime or illness, the degree of detriment to the child if services are not offered ..., the likelihood of the parent's discharge from incarceration ... within the reunification time limitations described in subdivision (a), and any other appropriate factors. In determining the content of reasonable services, the court shall consider the particular barriers to an incarcerated ... parent's access to those court-mandated services and ability to maintain contact with his or her child.... [¶]....[¶] An incarcerated ... parent may be required to attend counseling, parenting classes, or vocational training programs as part of the reunification service plan if actual access to these services is provided."

children did not begin until at least October 2013 although they were removed at the end of July 2013, and it took the social worker at least four months to mail him a new parenting packet after the first one apparently was lost in the mail, he was not provided reasonable services.

In reviewing the reasonableness of the services provided, we view the evidence in the light most favorable to the judgment, and if the juvenile court's finding is supported by substantial evidence, it is not disturbed. (*Angela S. v. Superior Court* (1995) 36 Cal.App.4th 758, 762; *In re Misako R.* (1991) 2 Cal.App.4th 538, 545 (*Misako R.*)). The standard for assessing whether reunification services were adequate is not whether the services provided were ideal, but whether they were reasonable given the circumstances in a particular case. "In almost all cases it will be true that more services could have been provided more frequently and that the services provided were imperfect. The standard is not whether the services provided were the best that might be provided in an ideal world, but whether the services were reasonable under the circumstances." (*Misako R., supra*, 2 Cal.App.4th at p. 547.) As father bears the burden of demonstrating error on appeal (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632), he must show that the juvenile court's finding that the Department made reasonable efforts to facilitate reunification services is not supported by substantial evidence.

We conclude substantial evidence supports the juvenile court's reasonable services finding. While the record shows both that there was a two to three month delay in initiating father's visits with his children before the October 8, 2013 dispositional hearing and that the social worker did not send father another parenting packet for approximately four months after he told her he had returned it, it cannot be said that these failures were unreasonable "under the circumstances." (*Misako R., supra*, 2 Cal.App.4th at p. 547.)

Although there was a delay in both services, father ultimately received them. The social worker did not immediately initiate visits despite the juvenile court's reasonable visitation order made at detention, but there is nothing in the record to show the cause of

the delay. Once father brought the lack of visits to the social worker's attention, the social worker promptly began the process for scheduling visits at the jail. By the time of the May 2014 six-month review hearing, father had been having consistent visits for at least six months. With respect to the parenting packet, father received one in January and returned it. It took the social worker several months to send him another one after realizing the Department never received the packet he returned, but there is nothing in the record to indicate the social worker was derelict in her duty. Instead, it appears that she kept waiting for the first packet to show up and when she finally concluded it was not going to be received, she sent a second packet. On this record, we find substantial evidence supports the juvenile court's reasonable services finding.

The Section 388 Petition

Father argues first that the juvenile court erred in granting the section 388, subdivision (c) petition because there was no changed circumstances or new evidence.⁸ He asserts the Department was aware he was incarcerated and faced sexual abuse charges at the time of the disposition hearing, and the only change since then was the social worker's admitted mistake in failing to correctly analyze the sexual abuse charges at that time, which cannot constitute new evidence sufficient to support a section 388 petition.

At the time of the disposition hearing, father had been charged with a number of Vehicle Code offenses as well as three counts of lewd or lascivious acts with a child

⁸ Father asserts the appropriate standard of review is de novo because he is contending the juvenile court did not correctly interpret section 388, subdivision (c)(1) as a matter of law, citing *In re J.P.* (2014) 229 Cal.App.4th 108, 122. We disagree that his argument is one of statutory interpretation, as the issue he raises is whether the record contains new evidence or changed circumstances sufficient to support the section 388 petition. Accordingly, we review the grant of the petition under the familiar substantial evidence standard. (See *Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 880 [applying substantial evidence standard of review to grant of section 388 petition terminating reunification services after disposition under the bypass provision of section 361.5, subdivision (b)(2)].)

under 14 with force, and an immigration hold was placed on him. According to Ramos, she recommended father receive reunification services in part because she did not know whether he would remain in custody for an extended period of time. After the disposition hearing, Ramos learned from the district attorney that father was facing a sentence of eight years if he accepted the plea bargain he was being offered. Moreover, father had not been released from custody; instead, he remained in custody throughout the proceedings through the combined section 388 and six-month review hearing. Because the district attorney's offer was made after the disposition hearing, the Department was not, and could not have been, aware of the fact that father was going to be incarcerated for a period that exceeded the 12-month reunification period at the time of the disposition hearing. It is true that it was not certain when father would be released from custody, as his criminal proceeding had been delayed, he had not actually accepted the offer at the time of the hearings on the section 388 petition, and he had not been tried or sentenced. The juvenile court, however, reasonably could find that father would remain in custody for a significant period of time, or at least until after the 12-month review hearing, which fact was not available to the Department at disposition and therefore constituted new evidence.

Father also contends there was not clear and convincing evidence that continuing services would be detrimental to the children. In assessing detriment, the juvenile court was required to consider the factors set forth in section 361.5, subdivision (e), such as the child's age, the degree of parent-child bonding, the length of the sentence, the nature of the crime, the degree of detriment to the child if services were not offered, the child's attitude toward services if the child is 10 years of age or older, the likelihood of the parent's discharge from incarceration within the reunification time limits, and other appropriate factors.

As father points out, the children were bonded to father, enjoyed their visits with him, and wanted to reunify with him. However, due to father's continued incarceration,

the length of the sentence father was facing, the immigration hold, and father's need to resolve the problems that led to dependency including father's sexual abuse of S., there was not a substantial probability his children would be returned to his care by the 12-month review date that was merely three months away. The only services father could avail himself of while at the county jail were visits and the parenting packets. Even if father completed the parenting packets, they would not address the problems that prevent him from reunifying with his children, and if he were released from custody before the 12-month review hearing, he would just be starting the core provisions of his case plan. Moreover, terminating father's services was not detrimental to the children, as they continued to receive visitation at the same frequency as before. Based on the evidence, the juvenile court reasonably could conclude, as it did, that continuing father's services would be detrimental to his children.

In sum, the juvenile court did not err when it terminated father's reunification services by granting the section 388 petition.

DISPOSITION

The juvenile court's orders granting the section 388 petitions as to father are affirmed.

GOMES, J.

WE CONCUR:

CORNELL, Acting P.J.

PEÑA, J.